

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RICHARD DIAB,

Plaintiff,

v.

No. CIV 14-0764 LH/LAM

**DETECTIVE DARCY MCDERMITT,
BETHENY GUTIERREZ,**

Defendants.

ORDER TO CURE DEFICIENCY

THIS MATTER is before the Court *sua sponte* pursuant to 28 U.S.C. § 1915(d) and Fed. R. Civ. P. 4(c)(3). Plaintiff's complaint, with notice and waiver of service forms, were mailed to Defendant Gutierrez. The forms were returned to the Court with a letter indicating that Ms. Gutierrez no longer works for the Corrections Department. [Doc. 23]. Because service has not been waived¹ or effected, Plaintiff is directed to **file a response to this order with a current address for Defendant Gutierrez so that service can be made on her.** *See Kelly v. Wilson*, No. 10-3218, 426 Fed. Appx. 629, 630-31, 2011 WL 2311875 (10th Cir. June 13, 2011) (unpublished) (noting the plaintiff's obligation to provide the defendant's address for service by the U.S. Marshal), and *Caldwell v. Martin*, Nos. 95-6101, 95-6381, 104 F.3d 367, 1996 WL 731253 at *1 (10th Cir. Dec. 20, 1996) (unpublished) (same). **Failure to timely cure**

¹ The letter from the State of New Mexico Corrections Department returning the notice and waiver of service packet to the Court states that “[i]t appears that a clerk from the Court who issued the notice and request for waiver signed the waiver of service form on behalf of Defendant Gutierrez,” and that “[t]his is contrary to Fed. R. Civ. P. 4(d)(A)(iii) [now, Rule 4(d)(1)(A)(ii)] in that a court clerk is not an agent authorized to receive service of process on behalf of defendant.” [Doc. 23 at 1]. The letter further states: “Please consider service not waived for Defendant Gutierrez.” *Id.* Since neither the Clerk nor the New Mexico Corrections Department attached a copy of the signed waiver of service form, the Court is unable to verify that the Clerk signed the form on behalf of Defendant Gutierrez; however, if the Clerk did so, the Court instructs the Clerk not to sign the form in the future.

the designated deficiency may result in dismissal of Plaintiff's claims against Defendant Gutierrez without prejudice without further notice.

IT IS THEREFORE ORDERED that Plaintiff cure the deficiency designated above within thirty (30) days from entry of this order.

IT IS SO ORDERED.

Lourdes A. Martinez
UNITED STATES MAGISTRATE JUDGE
LOURDES A. MARTÍNEZ